In the Matter of Merchant Mariner's Document No. Z-567190-D2 and all Documents Issued to: A. C. ETHRIDGE

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

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A. C. ETHRIDGE

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

By order dated 3 April 1958, an Examiner of the United States Coast Guard at New York, New York, suspended Appellant's seaman documents upon finding him guilty of misconduct. The specification found proved alleges that while serving as a messman on board the United States SS FLYING ENTERPRISE II under authority of the document above described, on or about 17 November 1957, Appellant deserted his vessel at Ponce, Puerto Rico.

At the beginning of the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Appellant was represented by counsel of his own choice. He entered a plea of not guilty to the charge and specification.

The Investigating Officer and Appellant's counsel made their opening statements. The Investigating Officer introduced in evidence the testimony of the Chief Mate and several exhibits including two certified copies of entries in the ship's Official Logbook. The Investigating Officer rested his case and counsel made a motion to dismiss on the grounds of failure to make out a prima facie case. After considering briefs submitted by both parties, the Examiner denied the motion.

In defense, Appellant offered in evidence his sworn testimony and numerous documentary exhibits. Appellant testified that he repeatedly complained to the Chief Mate, for a period of more than three months, about the pain, headaches and swelling caused by the infection of his right eye; Appellant thought that he was going to lose his sight and requested the Master and Chief Mate for medical treatment before leaving for New York City, on 16 November 1957, where he was found unfit for duty two days later.

Before the conclusion of the hearing, the oral arguments of the Investigating Officer and Appellant's counsel were heard and both parties waived the opportunity to submit proposed findings and conclusions. The Examiner rendered the decision in which he concluded that the charge and specification had been proved. An

order was entered suspending all documents, issued to Appellant, for a period of four months on twelve months's probation.

The decision was served on 3 April 1958. Notice of appeal was timely filed but Appellant's brief on appeal was not submitted until April 1959.

FINDINGS OF FACT

Between 9 July and 17 November 1957, Appellant was serving as a messman on board the United States SS FLYING ENTERPRISE II and acting under authority of his Merchant Mariner's Document No. Z-567190-D2. The ship was on a foreign voyage which started at New York City and was completed on 24 November 1957 at New York City.

Appellant repeatedly complained to the Chief Mate, about the pain and swelling caused by an infection in his right eye, commencing on 1 August and continuing throughout the remainder of the time during which Appellant remained on board. On 1 August, the Chief Mate diagnosed the ailment as a sty. He prescribed hot compresses and washing the eye with boric acid solution. In addition to occasional treatment by the Chief Mate, Appellant received professional medical treatment for his eye at not less than three different port before he left the ship and flew from Ponce, Puerto Rico to New York City on 16 November 1957.

The itinerary of the voyage after July and the approximate arrival dates were as follows:

Bombay	20 August 1957
Singapore	10 September
Hong Kong	16 September
Yokohama	20 September
Portland, Oregon	12 October
San Francisco	14 October
San Juan, Puerto Rico	3 November
Ponce, Puerto Rico	13 November
New York City	24 November

On 30 August at Bombay, Appellant's right eye was examined by a company physician who treated it with an ointment. Appellant was declared "fit for duty" although advised to consult a specialist on arrival in the United States.

On 11 September at Singapore, a physician in the Ophthalmic Department of the General Hospital submitted a statement that Appellant was suffering from recurrent internal hordeolm - a sty or infection of a tarsal (Meibomian) gland of the eyelid. (See definition p. 8) The doctor incised one swelling on Appellant's eyelid. He prescribed a medicine to be used two or three times daily and an ointment to be used once each night. He also stated that Appellant needed glasses for his work. The doctor did not make any direct statement as to whether or not he considered Appellant to be fit for

duty.

On 16 September in Hong Kong, Appellant purchased eyeglasses for 150 Hong Kong dollars. (This amount was between 25 and 26 United States dollars.) The record does not disclose that Appellant requested any further examination of his right eye in this port.

Apparently, Appellant did not visit a physician at Yokohama, Portland or San Francisco although the record is not clear with respect to Yokohama. (There is conflicting testimony between the Chief Mate and Appellant as to whether he requested medical treatment at Portland and San Francisco.)

On 12 November at San Juan, Puerto Rico, Appellant's right eye was examined by an ophthalmologist of the U.S. Public Health Service. This physician diagnosed the ailment as consisting of chalazion, conjunctival hyperemia (conjunctivitis) and refractive error. He prescribed an eye salve and discharge Appellant "to receive further treatment in New York." The Certificate of Medical Care states that the patient was "able to resume occupation." Appellant was given one copy of this certificate on 12 November to keep for himself and one or two additional copies which he gave to the Chief Mate.

On 13 or 14 November, the ship arrived at Ponce, Puerto Rico. On Saturday, 16 November, Appellant asked the Chief Mate to pay off Appellant because he was unfit for duty for medical reasons. The Chief Mate referred Appellant to the Master who refused to grant Appellant's request to be paid off. Appellant left the ship and returned shortly thereafter with a person Appellant claimed to be a member of the U.S. Coast Guard but who was not dressed in the uniform of a Coast Guardsman and was never identified as such to the Chief Mate or Master. Appellant's demand to be signed off was repeated to the Master and again refused. Either Appellant did not request medical attention ashore or, if he did, the Master acquiesced and then Appellant refused to accept it.

Appellant next went ashore to the office of the shipowner's port agent and, at Appellant's request, obtained an $80.00 advance of wages to fly to New York City where he lived. Appellant departed by plane on 16 November leaving most of his personal belongings on the ship. The Agent conveyed the information of Appellant's departure to the Chief Mate before the ship got underway for New York City on the following day, 17 November. Appellant was logged in the ship's Official Logbook as a deserter. The ship arrived in New York on 24 November. When Appellant went to the ship on 25 November, the Master refused to pay him.

On 18 November, Appellant reported to the General Outpatient Clinic of the Stapleton Public Health Service Hospital on Staten Island where he was declared "not fit for duty," on the basis of chronic infection of the conjunctiva of his right eye as well as small cysts and referred to the Eye Clinic. The medical reports in the record indicate that Appellant's eye was treated only twice at the Eye Clinic (on 4 and 19 December) before he was discharged as "fit for duty" on 26 December. The treatment at the clinic consisted of the application of salve and washing the eye. The Eye Clinic diagnosed the trouble as refractive error and conjunctivitis.

Appellant has no prior record with the Coast Guard since first going to sea in 1946.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant contends that the Examiner's decision is contrary to the facts and the law.

The contract created by the Shipping Articles is between the seaman and the shipowner since the Master acts as the agent for the owner. A shipowner's port agent has the authority and duty to arrange for the transportation of ill seamen. Since Appellant relied on the consent of the owner's agent at Ponce, Appellant did not breach his contract of employment. Therefore, he was not guilty of desertion. Appellant's intent not to desert is also shown by the fact that he left his gear on board the ship.

In order to prove desertion, it is necessary to show the absence of justification and a deliberate intention not to return to the ship's service. The failure of a Master to provide adequate medical attention justifies abandonment of the vessel. The Chief Mate admitted Appellant's continuous history of illness and complaints about plains in his eye. On 16 November, Appellant had justification for leaving because, regardless of the final medical diagnosis, he reasonably feared that he might lose the sight of his eye unless he promptly obtained better medical treatment than had been received up to this time.

It is respectfully submitted that, under these circumstances, the finding of desertion was without foundation and that the charge should be dismissed.

APPEARANCES: Standard, Weisberg, Harolds and Malament of New York City by Jack Weinberger, Esquire, of Counsel.

OPINION

A satisfactory and common definition of desertion by a seaman is the abandonment of duty by quitting the ship before the termination of the engagement, without justification and with the intention of not returning. The City of Norwich (C.C.A., N.Y., 1922), 279 Fed. 687. Hence, a necessary element of desertion is the intent to abandon the ship without justification or, in other words, without reasonable cause.

For the reasons to be discussed, I agree with the Examiner's conclusions (which reject Appellant's contentions) that the action of the shipowner's port agent at Ponce did not release Appellant from his obligations under his contract of employment; that Appellant's eye trouble was not justification for his abandonment of the vessel; and that Appellant was guilty of desertion.

With respect to the question of credibility as between the conflicting testimony of Appellant

and the Chief Mate, the Examiner did not make a specification finding as to which of these witnesses he believed. Nevertheless, the Examiner substantially accepted the version presented by the Chief Mate and rejected Appellant's conflicting testimony. The Examiner found that Appellant requested to be paid off on 11 November as testified to by the Chief Mate (R. 13, 38) and corroborated in an entry by the Master in the Official Logbook. The Examiner said that he was not convinced of the truth of Appellant's testimony that he was refused professional medical treatment on that date. Appellant repeatedly testified that he never asked to be paid off (R. 113, 111, 147). The Examiner also found that the identity of the person alleged by Appellant to be wearing a Coast Guard uniform (and denied by the Chief Mate) was never established in any manner; and rejected Appellant's testimony that he intended to return to the vessel (R. 102) by concluding that he intended not to return. In finding that Appellant was guilty as alleged, the Examiner, in effect, did not accept Appellant's testimony that "the doctor explained to me in San Juan [12 November] that the eye was too far gone" (R. 107); that the condition of the eye was much worse at Ponce on 13 November (R. 90); and that Appellant could barely see (R. 91). By exclusion from his findings, the Examiner rejected Appellant's testimony that, at Ponce, he requested medical treatment prior to 16 November. This was denied by the Chief Mate.

The Examiner, as the trier of the facts, was in the best position to judge the credibility of the witnesses. The evidence as a whole supports the choices made by the Examiner involving points of conflicting testimony. A good example of the probability of the inaccuracy of many statements by Appellant is his testimony that he was not given a copy of the medical certificate at San Juan on 12 November (R. 109). Later Appellant testified that he found his copy of the certificate (R. 139). Consequently, my above findings of fact are in accord with those of the Examiner with respect to such conflicting issues of fact as have been mentioned.

The circumstances clearly indicate that Appellant left the ship with the intention of not returning before the end of the voyage despite the contrary impression intended to be created by the fact that he left most of his personal belongings on board. In addition to the fact that he requested to be paid off at Ponce, Appellant admitted that the had been told by the Chief Mate that the ship was going to New York. Since the voyage commenced at this prot, it was probable that it would end there after arrival from Ponce. Appellant's testimony that he intended to return to the ship, presumably at Ponce, is incredible not only because of the time element involved but also because of the fact that he did not purchase or obtain sufficient advance of wages from the Ponce port agent to purchase, at a later time a return plane ticket to Ponce. As stated by the Examiner, it seems apparent that Appellant had a definite intent not to return to the ship prior to the completion of her voyage in New York.

Appellant's first contention on the merits is that his conduct was justified because the port agent at Ponce advanced wages to Appellant so that he could take a plane to New York. The evidence shows that this was done at Appellant's request after his request to be paid off by the Master was twice refused. It has been held that a port agent does not have any authority or duty to exercise control over the operation or management of the vessel; his only function is to make contractual arrangements for the benefit of the vessel when requested to do so by the Master. Dorn V. Balfour,

Guthrie and Co. (C.A. 9, 1958), 262 F.2d 48. A seaman can be discharged from the Shipping Articles only by the Master Hughes V. Southern Pacific Co. (D.C.N.Y. 1918), 274 Fed. 876) or by a United States Consul as provided for in 46 U.S. Code 682. A seaman is not guilty of desertion for leaving his vessel upon advised of a Consul. The City of Mexico (D.C.Fla. 1886), 28 Fed. 207. But Appellant did not follow the latter procedure. He went to the port agent and obtained money for transportation costs. As stated by the Examiner, Appellant's experience at sea for more than ten years and his failure to inform the Master of the action taken by the port agent is clear evidence that Appellant knew he was still bound by the decision of the Master. Therefore, Appellant cannot be protected against the charge of desertion for this reason both because, primarily, the agent had no authority to act as he did, secondarily, Appellant did not innocently place reliance on the improperly assumed authority of the agent.

The main issue in this case is whether the condition of Appellant's right eye as such that he was justified in breaching the Shipping Articles by permanently abandoning the vessel. Appellant contends that regardless of the final medical diagnosis, Appellant's conduct was justified because his eye had not received adequate medical attention and it was in such serious condition at Ponce that Appellant had reasonable cause to fear that he might lose the sight of his right eye. I do not agree that the medical treatment was inadequate or that Appellant had reasonable grounds for his fear.

The gist of the diagnosis contained in the medical reports is that Appellant's eye trouble was caused by refractive error and chalazion (Meibomian cyst). The refractive error diagnosis simply showed that Appellant needed eye-glasses. Any difficulty he had in seeing was probably due to this condition. Chalazion is a swelling of the eyelid caused by the retention of secretion in the Meibomian glands of the eyelid whose normal function is to lubricate the conjunctiva which is the mucous membrane that lines the eyelids and covers the exposed portions of the eyeballs. The reports indicate that this was a chronic condition with Appellant. This infection caused conjunctivitis (inflammation of the conjunctiva) and sties (inflammation of the Meibomian glands) with respect to Appellant's right eye.

The Bombay, Singapore and San Juan medical reports indicate that this was not such a serious ailment as to justify as to justify the abandonment of the ship by Appellant. Appellant was not found unfit for duty by any of the three physicians who examined his eye. At Bombay, it was concluded that Appellant was "fit for duty." The Singapore report states that Appellant "needs to wear glasses for his work." The implication is that he was not considered unfit to work with eyeglasses which were purchased at the next port. At San Juan on 12 November, Appellant was given a copy of the medical certificate which states that he was "able to resume occupation." It is highly unlikely that Appellant did not see or could not read these quoted words on the certificate, as he testified, since he admitted that he was able to and did read the words "to receive further treatment in New York" appearing on the same certificate (R. 107). The Singapore and San Juan reports were made by eye specialists.

Although the New York report states that Appellant was not fit for duty on 18 November, it is doubtful that this conclusion would have been reached if Appellant had still been serving on a ship. It is also noted that the original status of unfit for duty was based on an examination at the

General Clinic rather than the Eye Clinic. This medical report contains Appellant's home address in New York City but does not refer to the FLYING ENTERPRISE II. If there was any change in the condition of Appellant's eye between the time of the examination at San Juan on 12 November and at New York on 18 November, the respective medical reports indicate that it was for the better. The diagnosis at San Juan was chalazion, conjunctivitis and refractive error while at New York, the diagnosis by the Eye Clinic was only conjunctivitis and refractive error.

In addition, the treatment received in New York appears to have been meager in comparison with Appellant's repeated protestations of pain and fear of loss of sight. According to the medical report, Appellant was treated at the Eye Clinic only twice (4 and 19 December) before being discharged on 26 December. This is accepted as the extent of the treatment since counsel for Appellant expressed his desire to rely on the medical report for such dates rather than Appellant's memory (R. 137). Appellant did not keep an appointment at the Eye Clinic on 11 December due to the commencement of this hearing on the same date. No request was made to adjourn the hearing so that Appellant could keep this appointment. The only evidence as to the type of treatment is Appellant's testimony that it consisted of washing the eye and applying salve (R. 135). This was substantially the same treatment that had been prescribed since the outset of the ailment.

Extensive reference has been made to the nature of Appellant's eye infection and its treatment in order to provide the best basis contained in the record for evaluation of Appellant's numerous complaints. All of the above factors reflect unfavorably upon the authenticity of Appellant's repeated complaints and his stated reason for finally abandoning the voyage on 16 November. In turn, this indicates the answer to the question (which remains unresolved in the findings of fact above) as to what extent, if any, Appellant requested medical attention at Portland and San Francisco in October. Since the medical reports show that the condition of Appellant's eye was at least no worst on 18 November (New York) than on 12 November (San Juan) when Appellant was considered fit for duty, there was no justification, in fact, for his leaving the vessel on 16 November or reasonable grounds for him to leave on the pretext that the medical treatment received was inadequate. This is emphasized by the fact that Appellant had made no request to be paid off prior to 16 November. On the latter date, the Master would have been justified in denying a request for further medical treatment ashore in view of the recent report of 12 November and the impending departure for New York. Due to the apparent consistency of Appellant's condition between 12 and 18 November, this situation is not materially different than in the case where a seaman had been examined by a physician and found fit for duty before he left the ship on the same day. Ex Parte: John D. Barnes (D.C.Miss.), 1954 A.M.C. 2168. In concluding that Barnes was guilty of desertion, the Court stated that he had been attempting for sometime either to be classed as physically unfit for sea or to desert the ship. This is entirely different than a case where the seaman was exonerated because he was hospitalized ashore after getting a hospital certificate from the Master. Miller V. United States (D.D.S.D.N.Y.), 1943 A.M.C. 854.

Appellant's conduct when he arrived at New York indicates the lack of urgency considered to be involved even in his own mind. Although he visited the Public Health Service Hospital on 18 November, the record does not disclose that he was examined at the Eye Clinic prior to 4 December.

This was ten days after the ship arrived in New York: Appellant must have anticipated the ship's arrival since he tried to get paid by the Master on 25 November. Apparently, the latter function was more important to Appellant than the treatment of his eye although he claims to have been fearful of losing the sight in it on 16 November - almost three weeks before he went to the Eye Clinic in New York. Certainly, Appellant could not have honestly thought that the condition of his eye was very serious either when he left Ponce or after he arrived in New York.

No other case more similar to this one than the Barnes decision, supra, has been submitted or can be located in the reported cases. In an unreported decision dated 14 May 1958, the U.S. District Court for the Western District of Washington State, Northern Division,found that a seaman refused to accept the Master's offer of adequate medical treatment for his bloody, protruding hemorrhoids and held that the seaman's act of repudiating his contract of service, the Shipping Articles, by leaving the ship at Guam was one of the most inexcusable ship desertions ever called to the attention of the Court. Strong V. United States. An Examiner's order of revocation of a seaman's document was affirmed on appeal because he left a ship at Naples after a company physician prescribed rest and another local doctor suggested that Appellant be hospitalized in Commandant's Appeal Decision No. 447. In the latter case as in the one under consideration, the seaman was not hospitalized after deserting the ship.

The case cited by Appellant are not in point. Sherwood V. McIntosh (D.C.Me., 1826), Fed. Cas. No. 12,778 does not pertain, as Appellant contends, to the failure of a seaman to receive proper attention; but rather it states that a seaman is justified in leaving the vessel through fear induced by cruel treatment (severe injuries) and threats by the Master. The report in the case of Barron V. Locke (D.C. 1850), Fed. Cas. 1054 states that sickness was an excuse for a seaman to leave the vessel when the evidence showed that he was sick and "unable to be on board." No details as to the extent of the sickness are contained in the report. But the words "unable to be on board" seem to imply that the seaman became too sick to be expected to return on board and, therefore, he left the ship in the since that he was not on board when she sailed. The case presently under consideration does not fall into the category of either of these two cases.

The desertion of a ship by a seaman has always been regarded by the maritime law as very serious misconduct. According to the strict standards which have been set by the courts to justify an abandonment of the vessel by a member of the crew, it is my conclusion that Appellant was guilty of desertion. The courts attach great weight to the binding effect of Shipping Articles and state that it is a contract which should be lived up to scrupulously by both the owner and seaman. Rees v. United States (C.C.A. 4, 1938), 95 F.2d 784. This is why a seaman might more readily be declared under unfit for sea duty when he is not serving under articles than when he is. Compliance with the contract of employment is required to promote safety at sea. This factor is affected by desertion not only because it is an infraction of discipline which must be maintained at a high level on board ship but also because the proper operation of a ship is impaired to some extent when it is undermanned in any respect.

Appellant had every opportunity to obtain witnesses to support his version but not a single

one appeared at the hearing. When questioned by his counsel about the matter of requesting a further adjournment to subpoena witnesses, Appellant answered that he did not want to make this request of the Examiner (R. 144).

After considering, as matters of mitigation, Appellant's prior clear record and the fact that Appellant's eye infection caused him some pain and annoyance, the Examiner imposed the order of four months' suspension on twelve months' probation. It is also of some minor degree of importance that the ship was relatively close to the United States and not far from the end of her voyage at the time of Appellant's desertion. Nevertheless, this completely probationary suspension is considered to be lenient in the face of proof of the allegation of desertion outside of this country.

ORDER

The order of the Examiner dated at New York, New York, on 3 April 1958, is AFFIRMED.

A. C. Richmond
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D.C., this 23rd day of July, 1959.